NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-416

JOHN DOE, SEX OFFENDER REGISTRY BOARD NO. 524130

vs.

SEX OFFENDER REGISTRY BOARD.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The appellant, John Doe, appeals from his classification as a level two sex offender by the Sex Offender Registry Board (SORB). Doe argues that the hearing examiner (examiner) (1) erred by denying his motion for expert funds; (2) erred by allowing three correction employees to attend the classification hearing; and (3) arbitrarily and capriciously classified him as a level two sex offender. We affirm.

Background. Doe's classification as a level two sex offender stems from two incidents. In April 2014, Doe began communicating online with an undercover police officer whom Doe believed to be a fifteen year old female high school student. Doe, who was twenty-eight years old at the time, sent the undercover police officer a "frontal nude" photograph and two

videos of himself masturbating within twenty-four hours of their initial communication.

Doe thereafter arranged to meet the supposed minor female at a specified subway station. When Doe arrived at the station, police officers arrested him. He admitted to the police that he had sent the videos of himself masturbating and the "frontal nude" photograph, while believing the recipient was fifteen years old. He further admitted his intention to have sex with the fifteen year old girl. In January 2015, Doe admitted to sufficient facts in the Brookline Division of the District Court Department (Brookline District Court) to one count of child enticement. The case was continued without a finding and Doe was placed on supervised probation until January 26, 2017. As discussed below, Doe "was later found guilty and sentenced to six months in the house of correction after violating probation by committing additional sex offenses."

In October 2015, while on probation, Doe communicated with a ten year old female on a social media website. Doe believed that the victim was a fourteen year old female. Doe sent the victim a nude photograph of himself and otherwise communicated with her in a sexual manner. The victim told her mother about the messages whereupon the mother, posing as the girl, continued to communicate with Doe. Doe believed that he was still communicating with a fourteen year old female. He sent sexually

explicit messages, including nude photographs and videos of himself masturbating. During this time period, Doe was attending sex offender treatment with a licensed psychologist.

On April 1, 2016, Doe pleaded guilty in Bristol County Superior Court to one count of dissemination of matter harmful to a minor, and was sentenced to two years in the house of correction, with one year to serve, the balance suspended, and three years of probation.[1] In April 2016, a judge of the Brookline District Court found Doe in violation of his probation, revoked the continuance without a finding on the child enticement count, and sentenced him to six months in the house of correction.

In or around June 2016, SORB notified Doe of his obligation to register as a level three sex offender. Doe filed a timely request for an administrative hearing to challenge SORB's preliminary classification. On April 13, 2017, following notification and a hearing pursuant to G. L. c. 6, §§ 178C-178Q, Doe was classified as a level two sex offender. The examiner determined, by "clear and convincing evidence," that Doe "presents a moderate risk of reoffense and degree of dangerousness." Doe sought judicial review of that decision in the Superior Court pursuant to G. L. c. 6, § 178M, and G. L.

[1] Doe also pleaded guilty to one count of dissemination of obscene matter, which is not a sex offense under G. L. c. 6, § 178C.

c. 30A, § 14. A Superior Court judge denied Doe's motion for judgment on the pleadings and affirmed SORB's classification of Doe as a level two sex offender. Doe timely appealed.

Discussion. a. Expert funds. Doe argues that the examiner erred by denying Doe's motion for expert funds. We disagree.

"[T]he decision whether to grant an individual sex offender funds for an expert is a discretionary one, to be based on the facts presented in an individual case." Doe, Sex Offender Registry Bd. No. 89230 v. Sex Offender Registry Bd., 452 Mass. 764, 775 (2008). The offender carries the burden to "identify and articulate the reason or reasons, connected to a condition or circumstance special to him, that he needs to retain a particular type of expert." Id. Expert funds may be granted to "assist[] the hearing examiner in analyzing the factors enumerated in G. L. c. 6, § 178K, in order to determine the appropriate classification level for the plaintiff." Doe, Sex Offender Registry Bd. No. 15606 v. Sex Offender Registry Bd., 452 Mass. 784, 794 (2008).

Prior to the classification hearing, Doe filed a motion for expert funds, asserting three reasons why he required expert testimony: (1) SORB's regulations do not entirely address Doe's sex offenses as an "online solicitation offender"; (2) Doe had been identified as having "an immature personality, marked by a

lack of complete adult psychological development"; and (3) SORB intended to offer ultimate risk opinions into evidence. The examiner addressed each reason in denying the motion without prejudice.[2]

In support of his argument that the SORB regulations do not adequately address "online solicitation offenders" and noncontact offenses, Doe cites to a 2011 study. However, the 2011 study is incorporated, along with four other articles, into the SORB regulations. See 803 Code Mass. Regs. § 1.33(36)(a)(3) (2016). Furthermore, after Doe was placed on probation for attempting to meet in person with a minor female, Doe contacted a different minor female to engage in sexually explicit conversations. Those actions run counter to Doe's assertion that he required an expert to explain his risk to reoffend where the 2011 study he relies on states, in part, that "online solicitation offenders" may possess a lower risk of reoffending than other types of sexual offenders. Given Doe's actions and the inclusion within 803 Code Mass. Regs. § 1.33(36)(a)(3) (2016) of articles explaining "online solicitation offenders," the examiner did not abuse her discretion in denying the motion, particularly in view of Doe's failure to "identify and

[2] There is no evidence in the record before us that Doe ever attempted to provide additional information or otherwise supplement the administrative record in further support of his motion for expert funds.

articulate the reason or reasons, connected to a condition or circumstance special to him, that he needs to retain a particular type of expert." Doe, Sex Offender Registry Bd. No. 89230, 452 Mass. at 775. See Doe, Sex Offender Registry Bd. No. 15606, 452 Mass. at 794.

The examiner also did not err in denying expert funds to explain Doe's "immature personality." As the examiner stated in denying Doe's motion, Doe failed to argue what an "expert would testify to regarding a nexus between immature personality marked by a lack of complete adult psychological development and sex offense recidivism." He also failed to present research or other evidence to show this nexus. Thus, here again Doe did not "identify and articulate the reason or reasons, connected to a condition or circumstance special to him, that he needs to retain a particular type of expert." Doe, Sex Offender Registry Bd. No. 89230, 452 Mass. at 775.

In addition, the examiner did not err in concluding that expert funds were not needed where she intended to exclude any ultimate risk opinions from her consideration unless the mental health professional testified as an expert at the classification hearing. See 803 Code Mass. Regs. § 1.17(5)(c) (2016). The examiner confirmed in her decision after the classification hearing that she did not consider any ultimate risk opinions.

b. Public hearing. Doe also argues that SORB violated the sex offender registry laws and its own regulations by allowing three members of the sheriff's department to be present during his hearing. We disagree.

Under SORB's regulations, classification hearings "are not open to the public" but "correctional staff required by the facility to be present at the hearing shall not be considered members of the public." 803 Code Mass. Regs. § 1.14(2) (2016). See Doe, Sex Offender Registry Bd. No. 205614 v. Sex Offender Registry Bd., 466 Mass. 594, 602 (2013) (SORB's regulations have force of law).

Doe contends that "[a]llowing administrative personnel into a SORB hearing under the auspices of 'security' is tantamount to a public hearing." It was stated at the start of the hearing that the correction employees were present for security purposes, with one employee present as a trainee.[3] After Doe objected to the presence of the employees, the examiner noted that the three employees would be allowed in the room and that "[w]e do have to defer to the facility's security policies." We are unable to say on this record that the presence of the three members of the sheriff's department morphed the hearing into a

[3] The employees identified themselves at the start of the hearing as a booking and intake assistant, a coordinator of intake services, and an officer, all at the Bristol County sheriff's office.

public hearing. See Doe, Sex Offender Registry Bd. No. 22351 v. Sex Offender Registry Bd., 81 Mass. App. Ct. 904, 906 (2012) (presence of two correction employees did not transform classification hearing into public hearing). Moreover, Doe did not show that the employees' presence prejudiced him in any way. See id. (court "discern[ed] no prejudice" to offender from correction employees' presence at hearing). Therefore, the examiner did not err by allowing the three employees to be present during the hearing.

c. Classification as a level two sex offender. Doe raises several arguments as to why the examiner's decision is arbitrary and capricious. For the reasons that follow, we disagree.

First, Doe argues that the examiner disregarded the six scientific articles about Internet sex offenders that Doe introduced at the classification hearing. Contrary to Doe's assertion, the examiner did not disregard the articles. She stated in her decision that four of the six articles are cited in SORB's regulations under factor 36 and therefore she "consider[ed] these articles as interpreted in the Board's regulatory factors." Regarding the two articles not incorporated into factor 36, the examiner stated that she found them "informative and interesting" but did "not give them much weight." Where Doe communicated with a minor female in a sexually explicit manner, while on probation for his first sex

offense and while undergoing sex offender treatment, the examiner did not err in finding that sex offenders who use electronic means to communicate with minors to meet "in-person to engage in sexual misconduct present the greatest danger among online offenders." 803 Code Mass. Regs. § 1.33(36)(a)(3) (2016).

Second, it was permissible for the examiner to apply moderate weight to factor 9, history of alcohol and substance abuse. 803 Code Mass. Regs. § 1.33(9) (2016) ("An offender's history of drug and alcohol use and history of treatment, abstinence and relapse should be considered in determining the weight given to factor 9"). Here, Doe had a 2006 conviction for possession of marijuana; a doctor observed in a 2015 psychological evaluation that Doe's "chronic use of marijuana is also a concern" and that he should engage in "substance abuse counseling, focused on his chronic marijuana use"; and when Doe was arrested in 2014 attempting to meet the supposed fifteen year old female, he had asked the female to bring a glass pipe because his had broken. Thus, given Doe's history of marijuana use, the examiner did not err.

Finally, substantial evidence supports the examiner's classification of Doe as a level two sex offender under the clear and convincing evidence standard. See Doe, Sex Offender Registry Bd. No. 380316 v. Sex Offender Registry Bd., 473 Mass.

297, 298 (2015). See also Doe, Sex Offender Registry Bd. No. 136652 v. Sex Offender Registry Bd., 81 Mass. App. Ct. 639, 651 (2012). We must "take into account not only the evidence that supports the SORB's decision but 'whatever in the record fairly detracts from its weight.'" Id., quoting New Boston Garden Corp. v. Assessors of Boston, 383 Mass. 456, 466 (1981).

Here, we discern no error in the examiner's review and determination regarding the risk-elevating and risk-mitigating factors. See Doe, Sex Offender Registry Bd. No. 68549 v. Sex Offender Registry Bd., 470 Mass. 102, 105 (2014) ("SORB is required to consider a list of statutory factors in making its classification determinations"). The risk-elevating factors found were repetitive and compulsive behavior, adult offender with a child victim, relationship between offender and victim, alcohol and substance abuse, noncompliance with community supervision, and number of victims. See 803 Code Mass. Regs. § 1.33(2), (3), (7), (9), (13), (22) (2016). The examiner also concluded that certain risk-mitigating factors applied, including home situation and support systems, noting that "it is the support system itself that carries the greatest hope for rehabilitation in this case." See 803 Code Mass. Regs. § 1.33(28), (32), (33), (34) (2016). In applying the factors, the examiner concluded that "[o]verall, this case involves extremely concerning high-risk and risk elevating factors as

[Doe] reoffended against a Victim he perceived to be a child while on probation and in sex offender treatment." The mitigating evidence does not require that the examiner classify Doe as a level one sex offender. See Doe, Sex Offender Registry Bd. No. 10800 v. Sex Offender Registry Bd., 459 Mass. 603, 637 (2011). Moreover, the inapplicability of certain factors does not support risk mitigation. See Doe, Sex Offender Registry Bd. No. 10216 v. Sex Offender Registry Bd., 447 Mass. 779, 787 & n.8 (2006) (rejecting argument that examiner disregarded inapplicable factors that "should be interpreted as indicating a decreased risk"). Accordingly, we discern no error in the examiner's application of the relevant factors.[4]

Judgment affirmed.

By the Court (Milkey, Neyman & Englander, JJ.[5]),

Joseph F. Stanton

Clerk

Entered: June 10, 2019.

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[4] We also reject Doe's argument that dissemination of his registry information pursuant to G. L. c. 6, §§ 178I, J, K (2), would violate his State and Federal constitutional, statutory, and common-law rights because it would be punitive. His classification as a level two sex offender is supported by substantial evidence and information for level two sex "offenders is available to the public by request or on the Internet." Doe v. Lynn, 472 Mass. 521, 529 (2015). Moreover, the sex offender registry law "is generally regulatory rather than punitive." Doe, Sex Offender Registry Bd. No. 8725 v. Sex Offender Registry Bd., 450 Mass. 780, 787-788 (2008).

[5] The panelists are listed in order of seniority.